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In The

Supreme Court of the United States

TAHOE SIERRA PRESERVATION COUNCIL, INC., *et al.*,

Petitioners,

v.

TAHOE REGIONAL PLANNING AGENCY, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF NATIONAL AUDUBON SOCIETY, NATURAL RESOURCES DEFENSE COUNCIL, NATIONAL WILDLIFE FEDERATION AND SIERRA CLUB IN SUPPORT OF RESPONDENTS

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BRIEF *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

The *amici curiae*, national conservation organizations representing citizens in California, Nevada and across the country, urge the Court to affirm the judgment of the Court of Appeals.[1]

SUMMARY OF ARGUMENT

The Court should reject the proposal that it jettison the parcel as a whole rule in taking cases involving regulatory use restrictions. This established rule is essential to a balanced, workable doctrine of regulatory takings. Applying the parcel as a whole rule in this case, TRPA's moratorium, which only deferred development and did not eliminate all economic value, did not effect a *Lucas*-type taking.

This case calls for no basic change in the law because the Constitution already affords property owners appropriate remedies for ostensibly temporary moratoria which are in fact indefinite or permanent, as well as for arbitrary or otherwise invalid moratoria. This case involves no claim under *Penn Central*, and the Court should not speculate about how *Penn Central* (which does not actually support a distinct taking claim) might be applied in some other case.

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[1] Counsel for the parties have consented to the filing of this brief. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than *amici* and their counsel, made a monetary contribution to the brief's preparation or submission. *See* Rule 37.

Finally, the Court should reject many of the assertions by petitioners and their *amici* about the economic and political implications of proposals to expand regulatory takings doctrine. Property owners do not need expanded protection under the Takings Clause to counter political powerlessness; extensive takings liability would not make government decision-making more economically rational; and expanded takings liability would not simply impose a modest condition on the pursuit of important public objectives.

ARGUMENT

I. The Court Should Reject the Proposal That it Jettison the Well-Established Parcel as a Whole Rule.

Petitioners and their *amici* mount a radical assault on the rule that a taking claim based on a regulatory use restriction must be analyzed in relation to the "parcel as a whole." Under conventional takings analysis, a moratorium is generally not viewed as a taking because it lasts only a few years (or less) and has no affect on the owner's use of the property outside the moratorium period. Borrowing from the Court's approach to taking claims based on *physical occupations*, petitioners and their *amici* contend that a moratorium should be analyzed in isolation without regard to the uses the owner has made of the property and can make of the property during the rest of his ownership. As they frankly acknowledge, according to their reasoning, the parcel as a whole rule should be discarded for *all* regulatory taking challenges based on use restrictions.

Even petitioners and their *amici* recognize that the trajectory of this argument takes them straight off a cliff. Accordingly, they advance various ad hoc proposals for possibly softening the consequences of the argument, such as a one-year-might-still-be-OK exception, *see* Brief of Institute for Justice, at 30, or an exception for "quite short" pauses in permitting, *see* Brief for Petitioners, at 49. In fact, the position of petitioners and their *amici* on the parcel issue is so fundamentally wrong that nothing can save it.

A. The Parcel as a Whole Rule Is an Essential Component of Takings Doctrine.

It would be difficult to overstate how central the parcel as a whole rule is to takings jurisprudence and what an extraordinary change in the law petitioners and their *amici* propose. As they acknowledge, it would compel the rejection of longstanding Court precedent.

The Court has articulated and applied the parcel as a whole rule many times. The Court has applied it in rejecting proposals to segment a single landholding into separate parcels geographically. *See Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 130-31 (1978); *Dolan v. City of Tigard*, 512 U.S. 374, 385 n.6 (1994). The Court also has rejected efforts to divide property into individual sticks based on the separately identifiable legal interests that make up property. *See Andrus v. Allard*, 444 U.S. 51, 65-66 (1979); *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 643-44 (1993). Finally, the Court has rejected efforts to segment property in the temporal dimension as

well. *See Block v. Hirsh*, 256 U.S. 135, 156 (1921); *Agins v. City of Tiburon*, 447 U.S. 255, 263 n.9 (1979).

The parcel as a whole rule is necessary to prevent takings doctrine from literally destroying government's capacity to function. As Justice Holmes famously remarked: "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the law." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922). If every taking claim had to be evaluated in relation to the affected interest or portion of the property, then regulation would "always" result in a taking. *Concrete Pipe*, 508 U.S. at 643. Jettisoning the parcel as a whole rule would, in effect, collapse the police power into the eminent domain power.

The parcel as a whole rule also prevents judicial intrusions into the affairs of the other branches and interference by the federal courts with the independent functioning of state and local governments. The parcel as a whole rule, because it keeps regulatory takings doctrine within a relatively narrow scope, implements the general presumption in favor of the constitutionality of legislative action and reinforces the principle that matters of social and economic policy should generally be resolved by the political branches. Absent the parcel as a whole rule, litigants could invoke the Takings Clause to force the courts to play the role of an imperial judiciary routinely resolving society's most important economic and social issues.

The parcel as a whole rule also has more practical justifications. An owner completely prohibited from

exploiting a property's economic value, *see, e.g., Lucas*, suffers a qualitatively different type of interference with his investment plans than an owner prohibited from developing only a portion of a larger property, *see, e.g., Dolan*. Thus, a regulation which destroys the value of a particular investment logically raises a more serious constitutional issue than a regulation which simply diminishes the value of an investment by restricting the use of a portion of the property.

In addition, the parcel as a whole rule allows for an accurate accounting of both the negative and the positive effects of regulation on property values. In evaluating a taking claim, "the[ ] benefits [of regulation] must be considered along with any diminution in market value that the [owners] might suffer." *Agins v. City of Tiburon*, 447 U.S. at 262. In the rare case where a regulation eliminates an entire property's economically viable use, there are, of course, no countervailing benefits to consider with respect to the particular property. On the other hand, if a regulation only restricts use of a portion of a property, under the parcel as a whole rule the courts can weigh both how the restrictions limit development opportunities and how they enhance the value of development opportunities that remain. Thus, in *Palazzolo v. Rhode Island*, 121 S.Ct. 2448 (2001), the Court's application of the parcel as whole was just and fair in part because the beneficial effects of the wetlands restrictions on a portion of the property (and on neighboring properties) went a long way toward explaining why the developable portion of the property increased in value so dramatically after the restrictions were imposed.

The rule has the same virtues in the temporal dimension. There is all the difference in the world between a regulation which blocks development permanently or indefinitely, and a temporary moratorium which by its express terms only lasts for a limited period. As an economic matter, if a planning moratorium succeeds in its purpose of helping to improve the quality of the community as a whole, a moratorium should enhance property values for development once it is lifted. Given that property owners routinely hold property for lengthy periods for eventual development or resale (in general and in the Tahoe basin in particular), there is no reason to assume that development moratoria necessarily have *any* adverse economic impacts on property owners.

If anything, the argument for property "segmentation" is at its very weakest ebb in the context of temporal restrictions. In the spatial dimension, there are at least arguably relevant legal subdivisions of property interests which could conceivably (but incorrectly in our view) justify property segmentation. *Cf. Lucas*, 505 U.S. 1016 n.7. By contrast, time is a natural continuum which does not lend itself to natural or easy legal subdivision.

Under the traditional parcel as a whole rule, the TRPA moratorium – and temporary planning moratoria in general – are clearly not facial takings under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). The moratorium did not eliminate development uses, it simply deferred them for a relatively brief period. As a result, the moratorium did not strip the property of all

economic value, if it had any adverse economic effect at all.[2]

B. Physical Occupations v. Restrictions on Use.

Contrary to the position of petitioners and their *amici*, the fact that a *physical occupation* may, in a sense, be deemed a taking of the affected portion does not support discarding the parcel as a whole rule for taking claims based on *use* restrictions.

In the leading Court precedent on physical-occupation takings, *see Loretto v. Tele-prompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), the Court explicitly and repeatedly emphasized the distinction between physical occupations and use restrictions. The Court said, on the one hand, it "has often upheld substantial regulation of an owner's use of his own property." *Id.* at 425. On the other hand, the Court said next, "we have long considered physical intrusion by government to be a property restriction of an unusually serious character for the purpose of the takings clause." *Id.* The Court also cited several "recent cases confirm[ing] the distinction between

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[2] A telling statement in the TSPC monthly newsletter from the early 1980's suggests that many owners had little actual interest in developing their properties during the period of the moratorium. *See Tahoe Outlook*, July-August, 1983 Vol. 4. No. 4 ("The fact is that due to economic realities, the pressures to build on these remaining single-family lots has nearly evaporated. . . . If given the choice, it is now clear that most property owners would much prefer to sell – particularly for a full, fair cash price to a governmental entity that is ready and willing to pay such a fair price for their lands.")

a . . . physical occupation . . . and a regulation that merely restricts the use of property." *Id.* at 428, citing *United States v. Causby*, 328 U.S. 256 (1946); *United States v. Central Eureka Mining Co.*, 357 U.S. 155 (1958). *See also id.* at 427, 436, 441 (discussing the differences between physical occupations and use restrictions).

The special status the Court has accorded physical occupations reflects the importance of the property, liberty as well as privacy interests threatened by an invasion of a citizen's personal physical space. As the Court said in *Loretto*, "an owner suffers a special kind of injury when a *stranger* directly invades and occupies an owner's property." *Id.* at 436 (emphasis in original). The Court continued: "such an invasion is *qualitatively more severe* than a regulation of the use of property. . . . " *Id.* (emphasis added).

The distinctive character of physical occupations is reflected in many aspects of the Court's taking jurisprudence. In *Loretto*, the Court established a special categorical rule for all permanent physical occupations of private property. By contrast, in *Lucas* the Court called for categorical treatment of use regulations only when the restrictions eliminated all economically viable use of the property, indicating that *most* use restrictions cannot be equated with physical occupations. Similarly, in *Dolan v. City of Tigard*, 512 U.S. 374 (1994) and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) , the Court articulated distinctive tests for evaluating takings claims based on permit conditions involving physical occupations of private property. In *City of Monterey v. Del Monte Dunes Ltd.*, 526 U.S. 687 (1999), the Court held that *Dolan* and *Nollan* do not apply to a claim based on a *use* restriction.

Against this backdrop, it is logical that a different "parcel rule" applies to physical occupations than to use restrictions. Given the "special" nature of the injury an owner suffers in the case of a physical occupation, and because any physical invasion literally affects an owner's privacy interests in the property as a whole, a physical occupation of a portion of a property can result in a taking. By contrast, because a regulatory use restriction rises to the level of a taking only in "extreme circumstances," *United States v. Riverside Bayview Homes*, 474 U.S. 121, 126 (1985), and does not invade the property in the same fashion, it is essential to differentiate between actual takings and those regulatory use restrictions which must be "borne to secure the advantage of living and doing business in a civilized society." *Andrus v. Allard*, 444 U.S. 51, 67 (1979). The parcel as a whole rule serves that crucial function.

C. The Futile Effort to Save the Segmentation Argument.

Even petitioners and their *amici* recognize that their argument leads to the unsupportable conclusion that every restriction on the use of property, no matter how minute in space or time, represents a taking. Their (reluctant and half hearted) efforts to save themselves from the consequences of their extreme legal position are unprincipled, impractical, and beyond the courts' competence and authority to administer.

The primary proposal is that the Court decree that a moratorium of no more than one year will be acceptable. This proposal obviously undercuts the entire argument

for treating temporary moratoria as takings in the first place; the Court's physical occupations precedents allow for no similar exception. For petitioners and their *amici* to acknowledge that *some* short-term moratoria may be permissible under the Takings Clause simply reinforces the conclusion that their effort to equate use restrictions with physical occupations will not wash. Furthermore, given the myriad array of planning challenges local governments face, this Court, which has limited land use expertise, is hardly in a position to set an appropriate maximum period for a moratorium that will suit all cases.

Another, more amorphous proposal is that the Court declare that a temporal restriction will not effect a takings so long as it is "quite short." This standard would improperly invite the courts to second guess the policy and technical judgments of local elected officials and land use planners, and would involve the Court in attempting to devise what essentially amounts to a legislative solution. In addition, it would generate an increased volume of litigation based on an uncertain legal test, imposing new legal burdens on local governments and greater legal uncertainty for regulators and the regulated alike.[3]

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[3] This possible exception draws some support from the Court's indication in *First English Evangelical Luthern Church v. County of Los Angeles*, 482 U.S. 304 (1987) that "normal delays" would not result in takings, *see id.* at 321. But, to be frank, this language is too ambiguous to support any fixed conclusion. It can be contended, of course, that "normal delays," such as to make "changes in zoning ordinances," are certainly broad enough to encompass development moratoria. But the larger point is that the Court seems to be describing an exception to a rule which the majority opinion does not actually articulate. One scholar has recently suggested that this portion of the *First English* opinion may represent a kind of judicial pentimento. *See* Thomas E. Roberts, "Moratoria as Categorical Regulatory Takings: What First English and Lucas Say and Don't Say," 31 *Envtl.L.Rep.* 11037, 11041 (2001). This explanation has at least the ring of factual authenticity.

Most importantly, however, this standard, like the proposed one-year exception, squarely contradicts the argument that temporary use restrictions are indistinguishable from physical occupations. In fact, short-term temporal restrictions on development are not takings because the parcel as a whole rule applies in takings cases based on use restrictions. Short term restrictions generally do not so severely burden the parcel as a whole that they amount to takings.

II. No Change in the Law is Required to Afford Owners Appropriate Opportunities to Challenge Sham or Arbitrary Development Moratoria.

Under existing law development moratoria of finite duration will rarely if ever raise a serious issue under the Takings Clause. The question presented by this case, therefore, is whether the Court should alter the legal status quo. In addressing this question the Court may wish to focus on whether existing constitutional and other legal remedies deal adequately with the types of legal concerns which the use of moratoria is likely to raise.

A. Existing Legal Remedies Are Adequate and Appropriate.

At the outset, one might ask, where is the beef? Petitioners and their *amici* have made no compelling case for dramatic judicial innovation. They have presented no persuasive evidence that this valuable planning tool creates economic injury or other unfairness, either in this case or in general. In addition, a number of state legislatures have enacted laws limiting the permissible duration of planning moratoria, *see, e.g.*, Montana Code Ann. § 76-2-306 (authorizing moratoria lasting up to 30 months), strongly suggesting that this issue is being adequately handled through the ordinary give and take of politics. As discussed in section III, there is no reason to believe that developers and other landowners are disadvantaged in the political process; if anything, the opposite is more likely to be the case.

As a constitutional matter, the use of planning moratoria appears to raise two potential types of legal concerns. The first is that a regulatory restriction, though labeled a temporary moratorium, might, in fact, be indistinguishable from a permanent or indefinite restriction. The second is that a moratorium, whatever its duration, might be enacted for some arbitrary or otherwise invalid reason. Existing law is adequate to address both types of concerns.

"Permanent" Moratoria. The first concern matches, of course, petitioners' version of this case, at least as reformulated for presentation in this Court. According to petitioners, TRPA enacted a prohibition on development in the early 1980's which, under the cover of different laws

and plans, has remained in force for several decades and continues in force today. They contend that TRPA's regulatory restrictions are legally indistinguishable from those at issue in *Lucas* and, therefore, there was a taking in this case.

Petitioners are entirely correct that an ostensibly temporary measure *might*, in fact, be so long lasting or indefinite in duration that it is a taking under *Lucas*. The courts are well equipped to look behind labels to find the substance of things. Thus, owners would certainly be entitled to allege, and courts might well find a taking, if a measure labeled as a "moratorium" actually were intended to last indefinitely, or if the government enacted a continuous series of short-term moratoria, effectively creating a single, permanent prohibition on development.

The problem for petitioners is that their characterizations of this case do not match the actual facts. In the early 1980's TRPA enacted a moratorium which (with several short, good-faith extensions) lasted less than three years, followed in 1984 by the enactment of a new regional plan (immediately enjoined by federal court), and in 1987 by the enactment of another regional plan. The 1987 plan differed from the prior 1984 plan and differed even more from the complete prohibition on development during the moratorium. *See Tahoe Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 911 F.2d 1331, 1333 (9th Cir. 1990). In place of the prior, flat prohibition on development, the 1987 plan (much like the 1984 plan) provided a series of flexible alternatives for landowners, including the opportunity to develop certain lots, *see, e.g., Kelly v. Tahoe Regional Planning*

Agency, 855 P.2d 1027 (Nev. 1993); to sell transferable development rights, *see, e.g., Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); and to sell the fee to the government, *see, e.g., Carpenter v. Tahoe Regional Planning Agency*, 804 F.Supp. 1316 (D. Nev. 1992). To be sure, various aspects of the 1987 plan were or might be subject to a possible claim under the Takings Clause or to some other legal challenge. The point for the purpose of *this* takings case, however, is that the 1987 plan (and the 1984 plan) cannot remotely be described, in substance, as a simple extension of the earlier moratorium.[4]

"Arbitrary" Moratoria. The second type of legal concern which a planning moratorium might raise is that, quite apart from its duration, it is somehow arbitrary or otherwise invalid. For example, a moratorium might be designed to address a nonexistent or trivial planning concern, local officials might have no intention of using the moratorium period to address the problem, or government officials might be motivated by improper animus toward some individual or group. This type of concern can raise a potential constitutional issue, but one that logically falls under due process (or possibly equal protection), not takings. *Cf. Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998).

The Court has suggested on occasion that a government action "effects a taking" if it "does not substantially

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[4] The district court resolved the question whether the 1987 plan represented a new regulatory regime or was a mere continuation of the prior moratorium in the context of addressing TRPA's statute of limitations defense, and this Court declined to grant certiorari on the statute of limitations issue.

advance legitimate state interests." *Agins v. City of Tiburon*, 447 U.S. at 260. An arbitrary or unreasonable moratorium, it might be said, should be held to be a taking because it fails to advance a legitimate government interest. The petitioners do not, of course, rely on this argument; indeed they positively disavowed this theory, apparently recognizing that TRPA's efforts to save Lake Tahoe unquestionably advanced a legitimate public interest. *See* Plaintiffs' Motion in Limine and for Order Precluding Admission of Anticipated Testimony and Documents, filed October 29, 1998. The larger point, however, is whether this test can apply in *any* takings case.

Today there is a real question whether this ostensible takings test exists at all. The Court has never explicitly applied this test to support the conclusion that a regulatory use restriction effects a taking. *Cf. City of Monterey v. Del Monte Dunes Ltd.*, 526 U.S. 687 (1999) (upholding a jury verdict based in part on the *Agins* test, where the municipality waived any objection to the jury instructions). In recent decisions, seven justices have either stated, or joined in opinions stating, that the legitimacy of this ostensible takings test is, at a minimum, an open question. *See Del Monte Dunes Ltd.*, 526 U.S. at 732 n.2 (Scalia, J. concurring in part and concurring in the judgment); *see id.* at 753 n.12 (Souter, J., dissenting, joined by Justices O'Connor, Breyer, and Ginsburg); *Eastern Enterprises v. Apfel*, 524 U.S. 498, 545 (1998) (Kennedy, J. concurring in the judgment and dissenting in part).

In fact, this ostensible takings test does not involve a takings question. The Takings Clause, at bottom, is concerned, not with whether a governmental action can go

forward, but with whether the public must pay compensation as a condition of the government action. *See Preseault v. ICC*, 494 U.S. 1, 11-12 (1990). Thus, a viable taking claim presupposes that, apart from the absence of compensation, the government action serves a legitimate purpose and should be permitted to proceed. In Chief Justice Rhenquist's words, the Takings Clause "is designed . . . to secure compensation in the event of *otherwise proper* interference amounting to a taking." *First English*, 482 U.S. at 315 (emphasis added). If the government action is arbitrary or otherwise invalid, and should not proceed at all, it may well violate *some* provision of the Constitution, but it does not violate the Takings Clause. *See San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 656 n.23 (1981) (Brennan, J., dissenting), distinguishing a claim that an otherwise valid government action effects a taking from the "different case . . . where police power regulation is not enacted in furtherance of the public health, safety, morals, or general welfare." In the latter situation Justice Brennan said, "the government entity may not be forced to pay just compensation under the Fifth Amendment," but the owner may "nonetheless have a damage cause of action under 42 U.S.C. 1983 for a Fourteenth Amendment due process violation." *Id.*

The conclusion that the "substantially advance" test is not a legitimate takings test is also supported by the historical record, which shows that the *Agins* Court introduced this test into takings doctrine as a result of a mistaken muddling of due process and takings concepts. The precedent which the *Agins* Court cited to support this ostensible takings test, *Nectow v. City of Cambridge*, 277

U.S. 183 (1928), was unambiguously decided under the Due Process Clause, as was the leading precedent upon which the *Nectow* court relied, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). *See generally* Jerold Kayden, "Land Use Regulations, Rationality, and Judicial Review: the RSVP in the Nollan Invitation," 23 *Urban Lawyer* 301, 314-16 (1991).

As discussed, the conclusion that the "substantially advance" test is not a legitimate takings test does not mean that an owner cannot bring a constitutional challenge to an arbitrary or otherwise invalid moratorium. In fact, if property owners resort to the Due Process Clause, they will find entirely hospitable legal ground. *See, e.g., Lockary v. Kayfetz*, 917 F.2d 1150 (9th Cir. 1990) (material issues of fact existed as to whether moratorium on new water hookups violated substantive due process when there was evidence that no water shortage existed); *Q.L. Const. Co., Inc. v. Gallo*, 649 F. Supp. 1331 (D.R.I. 1986), *aff'd*, 836 F.2d 1340 (1st Cir. 1987) (finding due process violation where city imposed moratorium on sewer hookups but made no effort to remedy problem giving rise to moratorium); *Mitchell v. Kemp*, 575 N.Y.S.2d 337 (N.Y.App. Div. 1991) (holding that moratorium effected an apparent due process violation when municipality gave no satisfactory reason for five-year delay in enacting zoning ordinance). In short, there is no need to stretch takings jurisprudence beyond its logical limits to address every type of unreasonable burden moratoria place on land owners.[5]

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[5] The length of a moratorium may or may not be an issue in a challenge brought under the Due Process Clause. An

Stepping back, it is instructive to consider why advocates might seek to shoehorn due process issues into takings doctrine. According to their viewpoint, traditional review under the Due Process Clause is too deferential, and reframing substantive due process questions as taking issues, they hope, provides an opportunity for more searching judicial review of regulatory statutes. These criticisms of the Court's substantive due process doctrine may, or may not, provide fair ground for debate. But it is a question properly addressed in a Due Process case. The proper response cannot be to invent a searching facsimile of substantive due process review under the Takings Clause, where it does not and will not fit.

In addition, advocates for land owners have an incentive to seek to expand takings doctrine in this fashion because it would give owners the option of obtaining relatively generous "just compensation" awards (based on estimated market value for sale or rental), even if they have suffered no actual economic injury. *Cf. Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corp.*, 640 So.2d 541 (Fla. 1994) (rejecting plaintiffs' effort to recast a due process issue as a taking issue in order to avoid conferring windfalls on undeserving owners). This potential problem is a very real issue in a case involving a moratorium, where many landowners who sell or develop their property after the end of the moratorium

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excessively long moratorium would likely be strong evidence that the government is not acting reasonably to advance a legitimate governmental interest. On the other hand, even a very short moratorium would constitute a due process violation if it had no legitimate justification to begin with.

may suffer no economic injury whatsoever. By contrast, confining actual due process claims to the Due Process Clause would require claimants to show their actual damages, if any. A judicial innovation designed to confer private windfalls at public expense has absolutely nothing to recommend it as a matter of constitutional principle.

B. There is No Separate, Coherent *Penn Central* Taking Test.

As discussed in Section I, unless the Court were to take the revolutionary step of jettisoning the parcel as a whole rule, petitioners' *Lucas* claim must fail. Because the *Lucas* claim is the *only* claim that petitioners have pursued in this case, it would be inappropriate for the Court to consider how a possible claim under *Penn Central* might have fared in this case. However, if a *Penn Central* claim were at issue in this case, it would be important to address the problematic nature of such a claim. The factors originally enumerated in *Penn Central* remain central to regulatory takings doctrine. But, especially in light of subsequent evolutionary developments in the Court's takings jurisprudence, there is today no coherent, independent *Penn Central* "test" to apply.

In *Penn Central*, one of the Court's first efforts to put some flesh on the bones of regulatory takings doctrine, the Court said: "The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action." *Id.* at

124. While this language is sometimes said to have established a distinct *Penn Central* "test," it is doubtful that the *Penn Central* Court actually intended for this language to lay the foundation for a determinative test. The Court observed that defining a regulatory taking was "a problem of considerable difficulty," *id.* at 123, and acknowledged that it had no " 'set formula' for determining when 'justice and fairness' require" payment of compensation. *Id* at 124. The Court simply offered these three factors as having "particular significance" in what were, at the time, "essentially ad hoc, factual inquiries." *Id.*

Over the subsequent twenty-five years, the Court has significantly refined its treatment of the *Penn Central* factors, converting several of them into determinative tests. This process of refinement has, in effect, superseded the *Penn Central* factors; indeed, *no* litigant before the Court has *ever* successfully invoked the *Penn Central* test, except when some special feature (total economic loss, physical occupation) justified categorical treatment of the claim. *See District Intown Properties Limited Partnership v. District of Columbia*, 198 F.3d 874, 886 (D.C. Cir. 1999), *cert. denied*, 531 U.S. 812 (2000) (Williams, J., concurring) (offering the same reading of Supreme Court precedent). When a constitutional test supposedly exists, but is never used to support a finding of a constitutional infringement, decade after decade, the question naturally arises whether the test really does exist.

Upon careful analysis, it is clear that the *Penn Central* multi-factor analysis has little, if any, contemporary relevance. The *Penn Central* "test" has been thought to involve two distinct factors, in addition to the traditional

inquiry into economic impact: "character" and "investment expectations." In fact, neither factor helps demarcate a separate, coherent test for a regulatory taking.[6]

In mentioning the "character " of the government action, the *Penn Central* Court clearly was referring to whether a "physical occupation by government" was involved. *See* 438 U.S. at 124. Four years later in *Loretto*, however, the Court established a categorical taking rule for permanent physical occupations, robbing the character factor of most if not all of its meaning as a single factor in the multi-factor balancing test. Some lower courts have attempted to breathe new life into the "character" factor by interpreting it as referring to the value or importance of the public goal served by the regulation. This reinterpretation of the "character" factor is ultimately nonsensical. As the Court made crystal clear in *First English*, regulatory takings doctrine flows from and is governed by the same basic principles which govern exercises of the power of eminent domain generally. *See* 482 U.S. at 314. When the government seizes property by eminent domain, say for a road, it cannot be argued that the government has no obligation to pay compensation because the road addresses a "serious" or "important"

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[6] Academics from all ideological perspectives have criticized the *Penn Central* test. *Compare* Richard Lazarus, "Putting the Correct 'Spin' on Lucas," 45 *Stanford L.Rev.* 1411, 1429 (1993) (referring to "the unprincipled vagaries of the multifaceted balancing test prescribed by Penn Central") *with* Richard Epstein, "Property, Speech, and Politics of Distrust," 59 *U.Chi.L.Rev.* 41 (1992) (asserting that "the Supreme Court has positively gloried in its inability to articulate clear rules to govern this area," citing *Penn Central*).

public transportation problem. Similarly, in the regulatory takings context, it would make no sense to conclude that the importance of the police power objective being pursued should weigh against a finding of a compensable taking.[7]

The "expectations" factor also does not demarcate a distinctive *Penn Central* test. In *Palazzolo v. Rhode Island*, 121 S.Ct. 2448 (2001), the Court ruled that an owner's preacquisition notice of a restriction does not automatically bar a taking claim. But a majority of the Court indicated equally clear agreement that preacquisition notice, and an owner's investment expectations generally, are a relevant *factor* in takings analysis. *See id.* at 2465; *id.* at 2471 n.6; *id.* at 2477 & n.3. Furthermore, the Court apparently recognized that investment expectations should be relevant in a *Lucas* case specifically, at least in some circumstances. *See id.* at 2457, citing *Lucas*, 505 U.S. at 1035 (Kennedy, J., concurring) (stating that an owner's "investment expectations" are relevant in evaluating a *Lucas* "total taking" claim); *see also id.* 2477 (Breyer, J, dissenting).

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[7] The argument that there should be *no* finding of a taking because the government is pursuing a legitimate and important public purpose is simply the mirror image of the argument that there *should be* a finding of a taking because a government action fails to advance a legitimate government interest. *See* pp. 14-17, *supra*. The conclusion that a "substantially advance" claim does not involve a taking issue supports and reinforces the conclusion that "character," defined as the value or importance of the government's action, is not a relevant factor in takings analysis.

Real world examples confirm the intuitively compelling conclusion that investment expectations *must* be relevant in some *Lucas*-type cases.. For example, following the Court's decision in *Palazzolo*, could Mr. Palazzolo have sold off his restricted wetland acres to a new corporation and could the corporation then have sued under *Lucas*, thereby allowing Mr. Palazzolo to profit from a claim on which he otherwise might well not have prevailed? The idea seems preposterous. If that were the law, every owner could manufacture a claim with respect to any regulated sliver of his property.

This extreme result would achieve indirectly precisely what petitioners seek in this case – the elimination of the parcel as a whole rule. If a purchaser's pre-acquisition notice could be completely disregarded in a *Lucas*-type claim, then any owner could evade the parcel as a whole rule by subdividing the property into usable and unusable portions or interests. But assuming the Court is unwilling to take the radical step of jettisoning the parcel as a whole rule, the Court must reject a position on expectations which would allow owners to achieve the same end through the back door. Because, under this analysis, investment expectations must be at least a potentially relevant factor in a *Lucas*-type case, the expectations factor does not serve to demarcate a distinctive, separate *Penn Central* test either.

In sum, the "character" factor (as recently reinterpreted, to focus on the value or importance of the government action) is essentially meaningless in *all* takings cases, and the "investment expectations" factor is potentially meaningful in *all* takings cases. As a result, while all of the *Penn Central* "factors" remain relevant in

takings analysis, there is no coherent, independent *Penn Central* test left to apply.[8]

III. The "Political Process" Arguments for the Proposed Rewrite of the Takings Clause Are Incoherent in Theory and Wrong as a Matter of Fact.

Scattered among the legal arguments by petitioners and their *amici* for a more "robust" law of regulatory takings are a series of assertions and assumptions, many rooted in a simplistic law and economics analysis, designed to support the conclusion that a more expansive rule of takings liability would represent a positive reform. Because many of these assertions and assumptions are demonstrably wrong, or at least highly problematic, a brief response may be helpful to the Court.

Judicial Protection for Minority Interests. One pervasive theme in the briefs of petitioners and their *amici* is that property owners, because they may be relatively few in number, lack the political power to protect their interests in the political process. According to this view, the Court should place its interpretive thumb on the scales of justice on behalf of property owners in much the same way as the Court in the past extended protection for racial

[8] The conclusion that *Penn Central* does not provide a separate, coherent takings test does not, of course, directly answer whether a regulatory use restriction which does not fall under the "categorical" *Lucas* rule may still result in a taking under some circumstances. *But cf. Concrete Pipe*, 508 U.S. at 645 ("our cases have long established that mere diminution in the value of property, however serious, is insufficient to demonstrate a taking").

minorities and other disfavored groups. *Cf. United States v. Carolene Products Co.*, 304 U.S. 144, 149 n.2 (1938).

This argument is based on a simplistic and flawed premise. Property owners, simply because they often represent a minority interest, are not disadvantaged in the political process. In fact, property owners find it relatively easy to organize themselves into a cohesive and effective political force, in part precisely because they are relatively few in number, and also because they tend to be relatively well heeled and have significant monetary stakes in the issues. As a result, property owners and allied groups, such as developers and resource companies, represent highly effective political actors at the local, state, and national levels. By contrast, because virtually all citizens share an interest in protecting the environment, environmental advocates are a relatively difficult interest group to organize into an effective political force. *See generally* Mancur Olson, *The Logic of Collective Action* (1965).

Many of the *amici* supporting petitioners are in a poor position to argue for an expansive reading of the Takings Clause in order to protect property owners from the allegedly unfair results of the political process. For example, *amicus* American Farm Bureau Federation and many of its supporters and allies succeeded just a few weeks ago in persuading the House of Representatives to pass major new farm legislation that would *increase* farm subsidy levels by over $70 billion over 10 years. *See* Statement by Office of Management and Budget, October 3, 2001, www.whitehouse.gov/omb/legislative/sap/107-1/HR2624. The real estate development industry, which is also heavily represented in this case, has

successfully lobbied for favorable treatment under the tax code and many other federal and state laws. Landowners and developers are equally potent political forces at the state and local level.

Turning to this case, petitioner Tahoe Sierra Reservation Council, which describes itself as "a membership organization representing approximately 2,000 dues-paying members," *see* Joint Appendix at 22, has been an active and effective force, both through paid staff and outside legal counsel, in every facet of the TRPA planning process, as well as in proceedings before the state legislatures of the Compact States relating to the Lake Tahoe planning effort. While TRPA did not win every issue, it had a great deal of input into the 1987 plan, which contains many provisions that protect property owners' economic interests. Thus, TSPC is hardly a poster child for a revolution in takings law.

Internalizing Regulatory Costs. Another pervasive argument in the *amici* briefs is the notion that an expansive doctrine of regulatory takings is necessary and appropriate to force government to "internalize" the costs of its decisions. According to this view, regulatory activity inevitably generates costs, but government officials have no natural incentive to control these costs so long as they are laid off on third parties, such as property owners. A broad takings compensation rule, the argument continues, would force government to take these costs into account.

First, the premise of this argument is often wrong or at least questionable, because land use controls, which are designed to advance the welfare of the community as

a whole, often help increase property values. In the case of a moratorium which simply defers development, there is no *a priori* reason to think that the restriction necessarily has *any* adverse economic impact. Many owners in the Tahoe basin apparently did as well or better financially on their property investments as they would have fared in the absence of the moratorium.

Second, to the extent regulations of some kinds do produce costs, the cost internalization argument suffers from a fatal asymmetry. *See* Darryl J. Levinson, "Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs," 67 *U.Chi.L.Rev.* 345, 349-50 (2000). A full and accurate accounting would have to take into account both the costs and benefits of government action. But, unlike the situation with a private firm, which derives profits from goods and services sold to the public, government officials cannot tote up the direct benefits of their actions on any public ledger. If all the "costs" of government actions were internalized (through an expanded regulatory takings doctrine), while the benefits necessarily remained off budget, officials would systematically err in favor of property owners and against other interests. The quality of our environment would be undermined and, in economic terms, total social welfare would not be maximized.

Takings Liability as a Mere Condition. Yet another recurring argument is that the Court should have little concern about embracing an expansive view of regulatory takings doctrine because a finding of a taking does not result in a judicial injunction preventing the government from acting, but, instead, "merely" places a "condition" on the action – payment of compensation.

This argument has it exactly backwards. As a result of the Court's *First English* ruling, if a local government turns out to be wrong in its good faith belief that a regulatory action is not a taking, the government is compelled to pay compensation for the period the restriction was in place. An assessment of financial liability – and more importantly, the risk of financial liability whenever government attempts to regulate – creates a far more serious interference with the government's decision-making authority than the possibility of an injunction. This is especially true given the general unavailability of municipal liability insurance to cover regulatory takings awards.[9]

There is also a heavy dose of cynicism underlying this argument. Counsel for TSPC, who also served as counsel for plaintiffs in the *First English* case before this Court, argued for a mandatory compensation remedy in *First English* on the ground that an injunctive remedy would be relatively ineffectual, as compared to a compensation remedy, in influencing local government laws and polices. *See First English*, Brief for Petitioners, at 25-32.

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[9] The impact of compensation awards at the state level is more uncertain, mostly because it remains unclear whether state governments are immune from financial liability under the Takings Clause based on sovereign immunity. *See Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency*, 938 F.2d 153 (9th Cir. 1991) (dismissing claims against California and Nevada dismissed based on sovereign immunity). In the case of the federal government, which has waived its sovereign immunity against takings claims, *see* 28 U.S.C. § 1491, and which pays takings awards out of the Judgment Fund, *see* 31 U.S.C. § 1304, takings awards could be described somewhat more plausibly as imposing a "mere condition" on law making.

Given that their counsel succeeded in persuading the Court on the need for a compensation remedy in order to constrain local government authority, *see* 482 U.S. 304, 317, 321, it is surprising to discover TSPC now describing compensation as a relatively mild remedy as compared to the "judicial second guessing of governmental policies and decisions through disruptive injunctions." Brief for Petitioners at 42.

CONCLUSION

The Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

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